No. 1223

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

DANIEL J. HOULIHAN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

ARTHUR GARFIELD HAYS,
Solicitor for Petitioner.

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, DANIEL J. HOULIHAN, respectfully represents:

I. On July 2, 1941, the Grand Jury for the Southern District of New York, found an indictment charging the petitioner in one count with violation of the Selective Training and Service Act of 1940 (Section 311, Title 50 of the United States Code).

II. On September 11, 1941 said petitioner was convicted in the United States District Court for the Southern District of New York, after trial before the Honorable John Bright and a jury, on the single count of the aforesaid indictment, and the petitioner was sentenced on September 15, 1941 to imprisonment for two years.

III. The indictment charged the petitioner with an offense as follows:

> "That heretofore, to wit, beginning on or about the 16th day of September, 1940, and continuing thereafter up to and including the date of the filing of this indictment, at the Southern District of New York and within the jurisdiction of this Court, and at divers other places to the Grand Jurors unknown, Francis M. O'Connell, James J. O'Connell and Daniel J. Houlihan, the defendants herein, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together, and with each other, and with divers other persons to the Grand Jurors unknown, to evade the requirements of the Selective Training and Service Act of 1940, and the rules, regulations and directions made pursuant thereto, and to counsel, aid and abet the defendant Francis M. O'Connell to evade service in the land and naval forces of the United States, in the manner and by the means hereinafter set forth" (Record, p. 6).

IV. Upon the trial, at the conclusion of the Government's case, and again at the conclusion of the trial itself, counsel for the petitioner moved for a dismissal of the indictment on the ground that the conspiracy as alleged therein did not constitute a violation of Section 311 of Title 50 of the United States Code as charged in the indictment. These motions were denied.

The Selective Training and Service Act of 1940 was drafted to follow closely the provisions of the Selective Draft of 1917. (The Draft Act of 1917 included no specific penalty for the punishment of those who might conspire to evade that law.) In the 1940 Act there was inserted a provision covering punishment for those persons "who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or *conspire to do so*". (Italics ours.) No allegation was made nor proof adduced at the trial that the petitioner had conspired to hinder or interfere in any way by force or vio-

lence with the administration of the Act, and it was the contention of the Government throughout that no such allegation or proof was necessary. Prior to the 1940 Act conspiracies were punishable under Title 18, Section 88, and still are.

V. On September 19, 1941 petitioner duly appealed from the aforesaid judgment of conviction to the United States Circuit Court of Appeals for the Second Circuit.

VI. On March 24, 1942 the United States Circuit Court of Appeals for the Second Circuit unanimously affirmed the conviction, the opinion being rendered by the Honorable Augustus N. Hand, Circuit Judge, who in referring to that part of the Selective Service Act of 1940 under which the petitioner was indicted, said:

> "The question of chief importance is whether Section 11 of the Selective Training and Service Act is restricted by its terms to conspiracies to 'hinder or interfere in any way by force or violence with the administration of the Act'. While the terminology of Section 11 is awkward and not as perfectly clear as we might wish, nevertheless we think that conspiracies to violate any of the substantive offenses described in the section are within its purview."

The opinion is printed in full in the record submitted herewith (Record, pp. 460-466).

Statement of Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 [United States Code, Title 28, Section 347 (a)].

Question Presented

The following is the question presented by the petitioner:

I. Does a conspiracy to evade the Selective Training and Service Act of 1940, other than by use of force or violence, constitute a violation of Section 311 of Title 50 of the United States Code?

The opinion of the United States Circuit Court of Appeals, Second Circuit, admits that the language of this section is "awkward" and "not as perfectly clear" as the Court might wish. This is a criminal statute and the rule of strict construction must be applied. There are no reported cases known to your petitioner construing this section of this particular law. A clarification of the penalties under this important Federal statute cannot be had except by decision of this Court.

Reasons for Granting the Writ

Your petitioner respectfully urges, as will be more fully argued in the brief accompanying this petition, the following reasons why this application for a writ of certiorari should be granted:

I. The decision of the United States Circuit Court of Appeals, Second Circuit, deals with the interpretation of a Federal statute of importance and universal interest particularly at the present time. There being no common law crime against the Government, each case of necessity involves the construction of a Federal statute, and no one can be punished for a crime against the United States unless facts shown plainly and unmistakably constitute an offense within the meaning of the Act of Congress.

> *Specter* v. *United States*, 42 Fed. (2d) 937, 940; *United States* v. *Noveck*, 271 U. S. 201, 204.

The Supreme Court has had no occasion to render any decision specifically construing the penal provisions of the Selective Service Act of 1940.

II. The decision of the United States Circuit Court of Appeals for the Second Circuit construes the Statute in question in favor of the Government and against the party accused, which is directly contrary to the rule of construction in the case of ambiguities arising in penal statutes. The Supreme Court has repeatedly held that a criminal statute must be fixed and certain as to the crimes and offenses which it proposes to define; a criminal statute cannot rest upon an uncertain foundation. The opinion of the Circuit Court of Appeals for the Second Circuit in the instant case makes no finding as to the definiteness of the meaning of the section of the Federal statute involved. On the contrary, the Court merely states "* * * nevertheless we think the conspiracies to violate any of the substantive offenses described in the section are within its purview".

The opinion of the United States Circuit Court of Appeals in the instant case is in conflict, as to the construction of criminal statutes, with the decisions of and principles laid down in a long line of cases decided by this Court and of other Circuit Courts of Appeals, all of which hold that Federal crimes exist only by virtue of Federal statutes and that "no one may be required at peril of life, liberty and property to speculate as to the meaning of Federal statutes. All are entitled to be informed what the State commands or forbids". *Lanzetta* v. *New Jersey*, 306 U. S. 451. Among this line of cases are the following:

United States v. *Cohen Grocery Co.*, 255 U. S. 81;
Connally v. *General Construction Co.*, 269 U. S. 385;
Cline v. *Frink Dairy Co.*, 274 U. S. 445;
Fasulo v. *United States*, 272 U. S. 620;
Snitkin v. *United States*, 265 Fed. 489, C. C. A. (7th) 1920;
Gessel v. *United States*, 1 Fed. (8th) 283 C. C. A. (8th) 1924;

Speeter v. *United States*, 42 Fed. (2d) 937 C. C. A. (2nd) 1930;
First National Bank of Anamoose v. *United States*, 206 Fed. 374 C. C. A. (8th) 1913.

WHEREFORE, your petitioner prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and of all proceedings had therein; and that the order of the United States Circuit Court of Appeals affirming the judgment in this cause may be reversed and that the petitioner may have such other and further relief in the premises as this Court may deem appropriate.

Dated: New York, New York, May 6, 1942.

DANIEL J. HOULIHAN,
Petitioner.

Verification for the Petition

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK.

DANIEL J. HOULIHAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

State of New York,
County of New York, } ss.:

DANIEL J. HOULIHAN, being duly sworn, says:

I am the petitioner herein. I have read the foregoing petition by me subscribed and know the contents thereof. The facts therein stated are true to the best of my knowledge, information and belief.

DANIEL J. HOULIHAN.

Sworn and subscribed to before
me this 6th day of May, 1942.

FREDERICK GRIFFIN,
Notary Public, New York County.
N. Y. Co. Clks. No. 346, Reg. No. 2G351.
Kings Co. Clks. No. 169, Reg. No. 2254.
Bronx Co. Clks. No. 45, Reg. No. 186G42.
Queens Co. Clks. No. 811, Reg. No. 2523.
Commission expires March 30, 1942.

Attorney's Affidavit

State of New York,
County of New York, } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

ARTHUR GARFIELD HAYS.

Sworn and subscribed to before
me this 6th day of May, 1942.

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